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IN THE

Supreme Court of the United States

October Term, 1955

No. 140

JOSEPH DOTO, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Joseph Doto, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on March 24, 1955 (R. 194), affirming a judgment of the United States District Court for the District of Columbia imposed on a conviction under an indictment charging the Petitioner with violation of Section 2501, Title 22, D. C. Code (1951 Ed.) (Perjury). Petition for Re-Hearing duly filed was denied on May 11, 1955. (R. 193).

OPINION

The opinion of the United States Court of Appeals for the District of Columbia Circuit entered on March 24, 1955 and not yet reported is set forth herein (App. 1-5, R. 188).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the judgment of the United States District Court for the District of Columbia was entered on March 24, 1955. (App. 1-5). A Petition for Re-Hearing was in due course filed in the United States Court of Appeals for the District of Columbia Circuit and the same was on May 11, 1955 denied. (R. 193). On May 13, 1955 Motion to Stay the Issuance of Mandate for thirty (30) days was filed to enable the Petitioner to make application to this Court for a Writ of Certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit and on May 19, 1955 that Court ordered that the Mandate be stayed to and including June 16, 1955.

The jurisdiction of this Court is conferred by Title 28, U.S.C., 1254(1).

QUESTIONS PRESENTED

1. Under Senate Resolution 202, 81st Congress, 2nd Session, is the question "Well, you are a citizen of the United States?" a question material to the inquiry?

2. (a) Is not an acquittal of perjury on a count contained in the same indictment in which the question asked was "And were you born in this country?" and to which the reply was "Passaic, New Jersey" declaratory of the law so as to require like acquittal on the count charging perjury based on aspect of citizenship?

   (b) Is not the verdict of guilty on count with reference to citizenship inconsistent with verdict of not guilty on count with reference to place of birth?

3. Is not the conviction violative of due process provision of the Fifth Amendment for the following reasons?

(a) Conviction of perjury based on circumstantial evidence alone.

(b) Admission of police records and census records as to nativity, said records not having been made by Petitioner and not coming within any exception as to hearsay testimony and not being within contemplation of Title 28, U.S.C. 1732, (record made in regular course of business.)

(c) Because of prosecutor's comment to the jury as to failure of the defendant to offer testimony in his own behalf notwithstanding provision of Constitutional Amendment 5.

(d) Where prosecutor had elicited pedigree facts on direct examination of his witness and Petitioner through his counsel by way of cross examination was denied the right to interrogate as to pedigree facts involving the Petitioner.

CONSTITUTION AND THE STATUTES INVOLVED

The pertinent constitutional provisions and the statutes involved are as follows:

1. Fifth Amendment of the United States Constitution.
2. Sixth Amendment of the United States Constitution.
3. Title 22, Section 2501 D.C. Code (1951 Ed.).
4. Title 28, U.S.C. Section 1732.
5. Senate Resolution 202, 81st Cong. 2nd Sess. *(App. 6)*

STATEMENT OF THE CASE

The Petitioner was indicted (R. 2A-3A) for the crime of perjury, Title 22, Section 2501 D.C. Code (1951 Ed.). The indictment was in two counts, the perjury

being alleged to have been committed before the Special Subcommittee functioning under Senate Resolution 202, 81st Congress, 2nd Session.

The perjury alleged in count one was predicated upon question asked by Senator Wiley "And were you born in this country?" to which it was alleged the Petitioner replied "Passaic, New Jersey." Count two is based upon question asked by Mr. Halley, Committee Counsel, "Well, you are a citizen of the United States?" to which the Petitioner replied "That is right."

The transcript of proceedings at the trial in its entirety discloses that there was no evidence offered indicating that prior to December 12, 1950, the date of the appearance of the Petitioner before the Senate Subcommittee, there had been any evidence presented to the Committee suggesting any question before the Committee as to the identity, birth place or citizenship of the Petitioner. Moreover, this was specifically confirmed by the prosecution's witness Nellis (R. 87A).

The prosecution also offered in evidence under certification alleged birth records of the Petitioner, his mother and other members of his family and as well ship manifest records with reference to two arrivals of the appellant's father and one arrival of appellant's mother with him and other members of the family (Exhibit 2-8, R. 4A).

In addition the prosecution offered in evidence testimony of certain police officers as to records involving alleged arrests of appellant over a period of years (R. 166A-186A) and in connection with which records except in one instance it is conceded that the records were not made by the Petitioner and in no instance was the maker of the records produced as a witness. Likewise the prosecution offered in evidence census records

of the state of New York for 1915 and 1925 (R. 187A) in which it was indicated that the Petitioner along with other occupants of a designated address were born in Italy. The information contained in said records concededly was not given by the Petitioner.

In the course of the trial and as the prosecution was presenting its case one of the witnesses called was Anthony Doto, brother of the Petitioner. No suggestion was made by the prosecutor that the witness was being placed on the stand as a hostile witness. After the witness had testified at some length (R. 93A-102A) it became apparent that the prosecutor was not satisfied with the witness's testimony and proceeded to cross examine his own witness. Counsel for Petitioner objected to the procedure being indulged by the prosecutor whereupon the court remarked in the presence of the jury "I think he has a right to, Mr. Collins. He obviously is a hostile witness." Objection was made to this remark by the Court and motion was made for mistrial which motion was denied.

It was the contention of the Petitioner through his counsel at the trial that the procedure indulged by the prosecutor over and above the remark by the trial judge, was prejudicial to the Petitioner's rights to a fair trial and that same was violative of Title 14, Section 104 D.C. Code (1951 Ed.) dealing with the right of impeachment of one's own witness where the situation of surprise is announced.

In connection with this same witness Anthony Doto an examination of his testimony (R. 93A-118A) will disclose that the prosecution examined the witness at great length with reference to his own personal life and pedigree aspects and details as to the family which must be considered pedigree evidence. In the face of this

broad scope of examination by the prosecutor counsel for the Petitioner on cross examination of the witness asked "Did your family discuss with you—did you ever hear a discussion by your family with reference to Joseph and where he was born?" (R. 119A) to which question the prosecution objected on the ground that the examination was beyond the scope of the direct examination. The objection was sustained by the Court.

At the close of the prosecution's case Petitioner moved for judgment of acquittal on both counts of the indictment. The Trial Court thereupon granted the motion for judgment of acquittal on count one, the count covering the aspect of place of birth and overruled the motion as to count two dealing with the aspect of citizenship.

The Petitioner rested on this state of the record and the case was submitted to the jury on the second count. The jury returned a verdict of guilty. Subsequent to verdict and prior to judgment imposed on the verdict the Petitioner moved for judgment of acquittal notwithstanding the verdict of the jury and also moved in arrest of judgment and/or for new trial. These motions were all denied by the Trial Judge. (R. 6-A).

In connection with the motion for judgment notwithstanding the verdict and in arrest of judgment it was urged to the Trial Court that the Jury's verdict of guilty on the second count was inconsistent with the verdict of not guilty which had been entered on the first count by direction of the Court. It was suggested to the Court that the action of the Trial Court in directing a verdict of acquittal on the first count was declaratory of the law that should be applied in the case and that the not guilty verdict on the first count was res judicata as to the second count.

It is interesting to note that the United States Court of Appeals for the District of Columbia Circuit in its

opinion affirming the conviction did not mention the question of inconsistency of verdicts and the aspect of res judicata.

ARGUMENT

I.

Was the Question "Well, You Are a Citizen of the United States?" Material Under Resolution 202, 81st Congress, Second Session?

The Petitioner at the end of the prosecutor's case in addition to Motions to Strike Evidence and renewal of Motions for Mistrial moved for Judgment of Acquittal on two grounds.

As indicated in the indictment the Petitioner was charged with perjury in the one count in responding that his place of birth was Passaic, New Jersey and in the second count in responding that he was a citizen of the United States. The Trial Judge after argument on the Motion for Judgment of Acquittal granted the motion as to count one involving the aspect of birth place and denied the motion as to count two involving the question of citizenship.

The hearing in this instance made the basis of the prosecution was before the Senate's Committee to Investigate Organized Crime in Interstate Commerce, otherwise referred to as the Kefauver Committee.

The United States Court of Appeals for the District of Columbia Circuit in *Bowers* v. *U. S.*, 92 U.S.App.D.C. 79, 202 F.2d 447, an appeal from a conviction of contempt of the same committee, in its opinion not only points out the parallel between a contempt proceeding and a perjury proceeding but as well gives a most com-

prehensive consideration to the aspect of pertinency and materiality of questions asked by the committee.

Almost at the outset of the Bowers opinion (supra) at page 80 of the local report the Court, speaking through Judge Miller, states as follows:

> *"Obviously, then, the pertinency of the question is an essential ingredient of the offense, and one may not be convicted of violating the statute unless the government shows the question he refused to answer pertained to some matter being investigated."* (Emphasis supplied.)

On the same page and on page 81 of the Bowers decision (supra) Judge Miller states concerning Senate Resolution 202 (81st Congress, 2nd Session) the same resolution with which we are concerned in this instance:

> *"The initial step in determining the pertinency of the question is to ascertain the subject matter of the inquiry then being conducted by the subcommittee.*
>
> *"So, according to the record before us, the matter under investigation by the subcommittee was the activity vel non of organized crime through the facilities of interstate commerce."* (Emphasis supplied).

Pointedly, in the opinion of the *Bowers* case (supra) the question is posed as to whether the answers to the questions *would aid the Subcommittee in ascertaining the extent, if any, to which organized crime operates in Interstate Commerce, and the nature of such operations, if any.*

In the light of this question posed in the Bowers opinion (supra) the question is herein presented—what could the question and answer as to citizenship do insofar as aiding the Subcommittee in ascertaining the extent, if any, to which organized crime operates in Inter-

state Commerce and the nature of such operations, if any?

Senate Resolution 202 (supra) made no reference to the question of citizenship or place of birth of those that were involved but rather authorized the Committee to ascertain the aspect of crime in Interstate Commerce.

In this same Bowers opinion (supra) reference is made to *Christoffel* v. *U. S.*, 338 U.S. 84 (1949) involving a prosecution for perjury before a Congressional committee as is the situation in this instance. Just as the question as to the competency of the tribunal was material in the *Christoffel* case (supra) so the question of pertinency and materiality as to citizenship was essential in this case.

The United States Court of Appeals for the District of Columbia Circuit in the *Bowers* decision (supra) discussed the applicability of In Re Chapman, 166 U. S. 661, *McGrain* v. *Daugherty*, 273 U.S. 135, 173-174 and *Sinclair* v. *U. S.*, 279 U.S. 263 and other cases which it appears need no discussion in this Petition.

In the case of *U. S.* v. *Louis C. Rosenbaum*, Criminal No. 1332-52, a prosecution for perjury before the same Committee as is the situation of this Petitioner, Judge Burnita S. Matthews of the District Court in ruling on the only count of the indictment, the question and answer to which was for all practical purposes identical with the question and answer in count one of the instant case, granted a motion for judgment of acquittal on the basis that the interrogating of the subject as to place of birth was not material and pertinent under Senate Resolution 202 (supra).

In her opinion which is not in the official reports but as same is to be found in the files of the United States

District Court for the District of Columbia, Judge Matthews on the subject matter here involved states as follows:

> "The perjury statute applies only to false statements in material matters. In determining whether in this case the alleged false swearing was as to a material matter it is to be kept in mind that the subject matter of the investigation being conducted by the Senate Committee was whether organized crime utilizes the facilities of interstate commerce, and if so, the nature of such utilization and by whom.
>
> "Prior to the hearing at which the defendant appeared the committee had information that he was engaged in betting or gambling activities. It had no information as to whether he was or was not a citizen of the United States."

In this same opinion Judge Matthews made this further important observation:

> "The Court is not convinced that the defendant's birthplace pertained to or would shed light upon whether in 1951 organized crime utilized the facilities of interstate commerce, or the nature of such utilization, or by whom made. So the motion for judgment of acquittal is granted."

Petitioner would point out that since the *Bowers* decision (supra) this Court in *U. S.* v. *Rumely*, 345 U.S. 41, *has again indicated that there exists no broad powers in Congress through its committees to interrogate witnesses without limitation except on a basis of materiality and pertinency.*

More recently Judge Luther W. Youngdahl in *U. S.* v. *Owen Lattimore*, affirmed in part and reversed in part, 215 F.2d 847, a prosecution for perjury, again reiterated the requirement of materiality and pertinency as to questions presented at a Congressional inquiry and stated amongst other things the following:

> "So in a perjury case arising out of a Congressional investigation, which concededly may be broad in its scope as far as determining the necessity for corrective legislation is concerned, the element of materiality must be present or the charges fall."

This Honorable Court on May 23, 1955 in *Quinn* v. *U. S.* once again re-stated the law on this subject matter when through Chief Justice Warren it stated:

> "But the power to investigate, broad as it may be, is also subject to recognized limitations. It cannot be used to inquire into private affairs unrelated to a valid legislative purpose. Nor does it extend to an area in which Congress is forbidden to legislate. Similarly, the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary."

In the trial of this cause the prosecution in an effort to meet the requirements set forth in the *Bowers* case (supra) endeavored to support the materiality of the questions involved by having the witness Nellis, Associate Counsel of the Committee, testify (R. 27A) that the committee had before it the subject matter of immigration and allied subjects. A study of Resolution 202 (supra) immediately discloses that the subject matter of immigration and its ramifications was not intended as a field of investigation under the Resolution. It makes no difference that the witness Nellis (R. 36A) stated that the Commissioner of Immigration appeared before the Committee and testified. The fact is that the Commissioner clearly indicated in his testimony (R. 36A-41A) that there was no reason for this Committee to consider the subject matter because the same was under full consideration by another committee of the Senate of the United States.

The Immigration and Nationality Act enacted on June 27, 1952 over the President's veto is a law that accom-

plished a full and comprehensive revision of all prior statutes dealing with the subject matter of immigration, naturalization and nationality.

This Immigration and Nationality Act, otherwise referred to as the McCarran Act, came into being on June 27, 1952 after long and protracted hearings, first initiated in the Senate of the United States under Senate Resolution 137 of the 80th Congress. A study of Petitioner's Exhibit C., report of the Committee on the Judiciary of the Senate discloses that the Committee under Senate Resolution 137 (supra) and subsequent resolutions and bills fully considered not only the subject matter of immigration, naturalization and nationality generally but specifically criminal activities by aliens. (Tr. 207) Indeed as pointed to by the testimony of Mr. Nellis the Commissioner of Immigration, Mr. Mackey, advised the Committee involved in this instance (R. 36A-41A) that this subject matter was being fully and adequately considered by another committee of the Senate.

The history with reference to Senate Resolution 137 (supra) and other resolutions and bills that followed therefrom and which culminated in the so-called McCarran Act (supra) is clearly set forth in comments on the Immigration and Nationality Act at the beginning of Vol. 8, U.S.C.A., Section 1 to 1280.

Moreover, the witness Nellis was asked by counsel for Petitioner (R. 87A) as to whether prior to the occasion of the Petitioner taking the stand before the Committee there had been any evidence presented to the Committee at any time suggesting where the Petitioner was born or whether or not he was a citizen of the United States or any other country. The record (R. 87A) indicates that the witness knew of no such discussion or information before the Committee at the time that the Petitioner appeared.

In other words, the prosecution endeavored to place with the so-called Kefauver Committee the authority for an investigation that belonged to an entirely different Committee and which was not provided for in Senate Resolution 202 (supra). Moreover, a reading of the entire testimony of the Petitioner before the Committee as same appears in Part 7 of the official transcript of proceedings of the Committee indicates clearly that there was no problem before the Committee involving the question of place of birth or citizenship of the Petitioner. The two questions asked occurred in a most casual way and were not further pursued as suggesting any pertinency or materiality under Senate Resolution 202 (supra).

In the case of *U. S.* v. *Orman*, 207 F.2d 148, 160, the Third Circuit citing with approval the *Bowers* case (supra) states:

> "Pertinency under Section 192 has been much discussed in the cases. 'Pertinent', as used to describe a requisite for valid congressional inquiry, means 'pertinent to a subject matter properly under inquiry, not generally pertinent to the person under interrogation.'"

Moreover, in the *Orman* case (supra) the Court indicates that two separate elements must appear before pertinency is established:

1. "That material sought or answers requested related to a legislative purpose which Congress could constitutionally entertain: (citing cases)."
2. "That such material or answers fell within the grant of authority actually made by Congress to the investigating committee; (citing Bowers and Rumely, supra.)"

The Trial Judge in this case granted the Motion for Judgment of Acquittal as to count one based on the subject matter of place of birth. If the place of birth was

not material and pertinent as decreed by the Trial Judge in granting the Motion for Judgment of Acquittal then how can it be said that citizenship, based on birth in the United States was material and pertinent. The inconsistency of the Trial Judge's position in this regard is otherwise discussed under Point II of this Petition.

The United States Court of Appeals for the District of Columbia Circuit in its opinion, on page 2, stated:

> "We think the question whether organized crime, if it exists, is operated by citizens or by aliens is on its face a material phase of the investigation thus authorized."

It is respectfully submitted that no proper support is indicated in the said opinion for this very general statement.

II.

Is Not an Acquittal of Perjury Under Count One of the Indictment Declaratory of the Law of the Case so as to Require Like Acquittal on the Second Count and is Not the Verdict of Guilty on the Second Count With Reference to Citizenship Inconsistent With the Verdict of Not Guilty on the Count With Reference to Place of Birth?

Petitioner desires to point out that at the time of argument of the Motions in Arrest of Judgment and/or for Judgment of Acquittal and/or for New Trial it was urged to the Court that there was an additional reason why the verdict of guilty on count two of the indictment should not stand and that was because the same was inconsistent with the judgment of not guilty which the Court itself had ordered. In other words it was the Petitioner's contention that the acquittal on the first count was declaratory of the law applicable to the second count as well.

The Court granted Motion for Judgment of Acquittal on the first count on the basis that the question and answer made the basis of count one were immaterial under Resolution 202 which created the Committee and defined its scope of authority.

The question in count one going to the subject matter of place of birth was certainly no narrower than the question and answer made the basis of count two. Place of birth as contemplated in count one could be and of necessity must be a very important consideration on the subject matter of whether an individual is or is not a citizen of the United States. By the same reason the question of whether one is or is not a citizen of the United States is in large measure determined by place of birth.

It therefore follows that the granting of judgment of acquittal on count one while not laying a foundation for a plea of former jeopardy in connection with count two, was declaratory of the law applicable to count two and therefore was a determination of the law of the case for count two.

In the case of *Rosenthal* v. *U. S.* (C.C.A. 9th) 276 Fed. 714, where in one count of an indictment three defendants were accused of having bought and received property that had been stolen from a car, then being shipped in Interstate Commerce, knowing it to have been so stolen and the second count of the indictment charged that at the same time and place they had that property in their possession under like circumstances and with like knowledge and where on the first count the jury brought in a verdict of not guilty and two of the defendants were found not guilty on the second count, the court on the question of consistency of the verdicts stated as follows:

> "By its verdict upon the first count of the indictment the jury found that the plaintiff in error neither bought nor received the cigarettes from them (the thieves) with knowledge of the theft, and by its verdict on the second count that the plaintiff in error was at the same time and place in possession of the property with such guilty knowledge. The two findings were thus wholly inconsistent and conflicting. For this reason we feel obliged to reverse the judgment and remand the case for a new trial."

In the case of *Hohenadel Brewery Company* v. *U. S.*, 295 Fed. 489, the Third Circuit Court said:

> "The Brewing Company contended that the verdict of guilty on the seventh count cannot stand in the face of the verdict of not guilty on the other counts. If the government relies upon the facts charged in the other counts then on the seventh count the judgment cannot stand, but a jury has found as a fact that the company did not commit the act and in that case, the verdict, as defendant contended would be 'inexplicable and inconsistent'. Facts that have no legal evidence may not support a verdict. The verdict of guilty on the seventh count must be based on evidence other than that pleaded in support of the first six counts."

In the case of *Peru* v. *U. S.*, 4 F.2d 881, 884, the Court in a similar situation points out:

> "If the government relies on the facts stated in the first four counts to sustain the fifth count, the judgment cannot stand."

In the case of *Murphy* v. *U. S.*, 18 F.2d 509, the 8th Circuit likewise holds that inconsistent verdicts are not allowed.

In the case of *Boyle* v. *U. S.*, and et al, 22 F.2d 547, the Court again points out that where one count charged one defendant with conspiracy to maintain a nuisance and in another count with knowingly maintaining a nuis-

ance, the verdict of acquittal on the first count, and of conviction on the second count, are inconsistent.

In the case of *Speiller* v. *U. S.* (3rd Cir.) 31 F.2d 682, the Court points out that where a jury acquits on one count and convicts on another count, charging same crime, conviction cannot stand without other evidence than that on which acquittal was based.

See also—*Baldini* v. *U. S.* (C.C.A. 9th) 286 Fed. 133.

The acquittal on count one of the indictment is res judicata as to count two of the indictment for the additional reason that the question and answer in count one and the question and answer in count two occurred at the same appearance of the defendant before the Committee.

In the case of *U. S.* v. *Emspak*, et al, 95 F.Supp. 1012, (the *Emspak, Quinn* and *Bart* cases otherwise passed on by this Honorable Court on May 23, 1955) Judge James R. Kirkland of the United States District Court for the District of Columbia, indicated that notwithstanding a multiplicity of counts in indictments for contempt of Congressional Committees nevertheless in the given situations there is but one contempt involved.

Judge Kirkland referred to the early case of *Maxwell* v. *Rives* (1876) 11 Nevada 213, wherein it is stated:

> "A penal statute must be strictly construed. Upon that principle at least, if not upon more liberal principles of construction, the mere refusal of a witness to testify on the same trial of the same issue cannot be deemed more than one contempt, no matter how many questions he may refuse to answer • • • The district Judge erred in finding that each separate refusal to answer a question was a distinct contempt • • •."

Again Judge Kirkland referred to *People ex rel Tweed* v. *Liscomb,* (1875) 60 N. Y. 559, in which there is a collection of English and early American cases which involve multiple penalties for a single act.

Then Judge Kirkland referred to the case of *U. S.* v. *Yukio Abe,* Criminal No. 10,335 (Nov. 17, 1950), a decision by the United States District Court for the District of Hawaii, in which the court with respect to multiple count indictments stated as follows:

> "As to objections to the number of counts, the Court is of the opinion that the Government has the right to frame each refusal to answer in a separate count. Rule 8 of the Federal Rules of Criminal Procedure gives that right. However, as the questions appear to be directed all to one subject of inquiry and the answers were simultaneous during the proceedings, and continuous acts, the indictments therefore charge only one alleged offense. Kerr v. Squier, 151 F.(2d) 308 (Ninth Circuit); Price v. U. S., 150 F.(2d) 283-285 (Fifth Circuit); Upshaw v. U. S., 157 F.(2d) 716 (Tenth Circuit) strongly indicate that no matter how many refusals to answer may occur in an examination such as is alleged, the maximum sentence that could be imposed pursuant to the statute involved, Section 192, Title 2, U. S. Code, would be punishment for not more than one refusal."

Again Judge Kirkland referred to *Fawick Airflex Co.* v. *U.E.R. & M.W.A.,* (1950) 92 N.E. (2d) 436 (Ohio) and *People ex rel Amarante* v. *McDonnell,* (1950) 100 N.Y.S. (2d) 463, in which cases the respective courts held that only one contempt was committed and the defendant could receive only the maximum penalty for one contempt after conviction.

In said Fawick case (supra) the court uses the following:

> "As heretofore noted in this opinion, the appellant was found guilty of three separate acts of contempt

based upon his refusal to answer three separate questions.

> "It appears to the members of this court that the questions were of such character that they should be treated as an inquiry into but one single subject. The first question asked the witness directly was whether he was a member of the Communist Party. When he refused to answer, other questions were then asked, which, if answered in the affirmative, would have established an inference that he was such a member. In fact, the entire inquiry was directed toward the establishment of but one fact. The witness' refusal to answer the three questions under discussion contituted, in the opinion of the members of this Court, but a single contempt, for the reason that they all had to do with the same subject matter."

In *People ex rel Amarante* v. *McDonnell,* (supra), the New York Court stated as follows:

> "The question then presents itself as to whether or not by refusing to answer seven questions relating to the same subject matter the relator was guilty of seven separate and distinct contempts. If this question be answered in the negative, then the County Judge acted in excess of the jurisdiction conferred upon him in sentencing the relator to a term in excess of the maximum provided by law for a criminal contempt.
>
> "The court is of the opinion that the relator committed but one contempt. To hold otherwise would enable a prosecutor to ask an unlimited number of questions concerning the same subject matter or even to ask the same question in various forms, with the net result that a witness might be incarcerated for the balance of his life."

Again in the case of *U. S.* v. *Orman,* 207 F.2d 148, 160, the 3rd Circuit affirmed the conviction but remanded the case for change of judgments because the trial judge had imposed consecutive sentences on counts that were considered one contempt. In this case there is set forth all

the cases referred to by Petitioner in this Petition under this Point.

This Honorable Court on May 9, 1955 in the case of *Bell* v. *U. S.*, 99 L.Ed. 515 (No. 12, Adv.) confirmed the views of Judge Kirkland (supra) and the Orman case (supra).

III.

Is Not a Conviction Violative of Due Process Provision of the Fifth Amendment of the Constitution When the Conviction is

A. Based on Circumstantial Evidence Alone?

The prosecution in support of the charge of perjury offered:

1. Certification as to birth record of one Guiseppe Doto.
2. Ship manifest supposedly covering travel of one Guiseppe Doto and others.
3. Police and census records as otherwise discussed in this Petition (pages 22-26) suggesting Petitioner's place of birth as being in Italy.

The prosecution made no effort except through the manifest of ship travel, the census and police records (Exhibits 2-8, R. 4A, 166A-187A) to support the fact that the Guiseppe Doto referred to in Government Exhibit No. 6 was the Petitioner in this case.

The result is that the Government's position of supporting the charge was completely and exclusively based on circumstantial evidence.

The Petitioner at the trial (R. 13A) presented instruction No. 10, reading as follows:

> "The jury is instructed that a conviction of perjury may not be based upon the uncorroborated testi-

mony of a single witness or upon evidence which is wholly circumstantial. Perjury must be proved by the testimony of two witnesses or of one witness and corroborating circumstances; and while the alleged perjured statement need not be denied in its exact words, there must be positive testimony by at least one witness of facts that are absolutely incompatible or physically inconsistent with the alleged perjured statement of the accused.

"Corroborative evidence is additional evidence to the same point, and it must do more than cast a suspicion upon the accused. It must, in and of itself and independent of the evidence which it supports, tend to prove the commission of the offense and must tend with a reasonable degree of certitude to show that the accused is guilty as charged."

Also offered by Petitioner was Instruction No. 11 (R. 13A):

"The jury is instructed that perjury must be proved by the testimony of two witnesses, or of one witness and corroborating circumstances.

"The law requires that to support a conviction there be the testimony of at least one witness of facts clearly showing that perjury was committed as charged, and absolutely incompatible with the innocence of the accused, and such testimony must be corroborated by the testimony of at least one other witness or by evidence of corroborating circumstances, which evidence of itself tends to show that the defendant is guilty as charged."

Both of these instructions requested by the Petitioner were denied by the Court.

In *Maragon* v. *U. S.*, 87 U.S.App.D.C. 349, 187 F.2d 79, the United States Court of Appeals for the District of Columbia Circuit points out that the uncorroborated oath of one witness is not enough to establish, for purposes of conviction of perjury, the falsity of sworn testimony.

In the Maragon case (supra) the appellant had testified that he did not have any bank account in 1945 or 1946 except in the Union Trust Company of Washington, D. C. Testimony was offered that he had a substantial bank account in San Antonio, Texas. The fact was established at the trial that the said Maragon bought Cashier's Checks in Washington and deposited the same in the San Antonio Account and then further by admissions of Maragon of such facts to the representatives of the Senate Committee.

Moreover, in the Maragon case (supra) there was no admission of ancient records such as the police and census records in this case with nobody present to authenticate the fact of the author of such information. The fact is that the census records without any question were based on supposed information supplied by someone other than the Petitioner and as to the police records it could only be speculated that the recorded information on activities may have been given by the Petitioner.

The proof offered in this case surely did not meet the test laid down in *Hammer* v. *U. S.* (1926) 271 U.S. 620, 70 L.Ed. 1118 and in *Weiler* v. *U. S.* (1945) 323 U.S. 606, 89 L.Ed. 495, and as well in *U. S.* v. *Wood,* 14 Pet. 430, 10 L.Ed. 526 and *Cook* v. *U. S.,* 26 App. D.C. 427.

The Maragon case (supra) did not in any wise revise the fundamental rule recognized in the Hammer, Weiler, Wood and Cook cases (supra).

In the case of *U. S.* v. *Neff,* 212 F.2d 297, decided April 1, 1954 by the United States Court of Appeals for the 3rd Circuit the question and answer contained in count one of the indictment was:

> "Q. Did you ever attend a meeting of the Communist Party?
> "A. No."

The prosecution to support this count offered a witness who was a member of the defendant's union and a former member of the Communist Party who testified he had seen the defendant at two Communist Party meetings. This same witness indicated that the question of Communist Party dues was discussed at the said meeting and moreover that the defendant at the first meeting read a list of those who had paid dues and those who had not and then asked the witness to pay his dues which he paid the defendant.

The prosecution as corroborating evidence presented another witness who indicated that she was a member of the defendant's union and that he had admitted to her over a certain period that he had been a member of the Communist Party and in addition that in the presence of the defendant another party had said "you know she is a Communist."

Further as corroborating evidence the prosecution presented a witness employed in the office of the Secretary of the State of New Jersey who produced from the files a petition of nomination for a candidate for governor on the Communist Party ticket allegedly signed by the defendant and which petition contained a pledge "To support and vote for the person named in such petition."

Also as a corroborating evidence in this Neff case (supra) the prosecution presented an employee of Campbell Soup Company and a member of the defendant's union who said that on two occasions he paid the defendant one dollar as Communist Party dues.

In addition in this Neff case (supra) the prosecution as corroborating evidence offered another employee of the Campbell Soup Company and a member of the defendant's union who testified that he was a member of the Communist Party and claimed that he had paid Communist Party dues not to the defendant but to another,

but that he had heard the defendant request and had seen her collect Communist Party dues on a particular occasion from two people.

The Appellant in the Neff case (supra) questioned the sufficiency of such evidence to sustain a conviction on the particular count and suggested that only one witness testified that the subject ever attended a meeting of the Communist Party and that the other evidence was not corroborative of that witness' testimony.

The Court in the Neff case (supra) as did the United States Court of Appeals for the District of Columbia Circuit in the Maragon case (supra) pointed out that the uncorroborated oath of one witness is not enough to establish the falsity of the testimony of the defendant.

The Third Circuit reversed the conviction of the Appellant on count one for insufficiency of proof and directed the Trial Court to enter a Judgment of Acquittal. As well the Court directed a verdict of acquittal on count three and ordered a new trial as to count two of the indictment.

In the Neff case (supra) the prosecution had one witness under the test but failed as to corroboration. In the instant case we have the situation presented of no witness and an effort by the prosecution to sustain their position wholly and exclusively by circumstantial evidence.

Under the test laid down in Hammer, Weiler, Wood, Cook and Maragon (supra) and as reasserted in Neff (supra) the proof in this case totally failed to meet the test required in perjury cases and therefore independent of the question of pertinency and materiality the Court should have granted the Motion for Judgment of Acquittal.

The standard laid down in Hammer and Weiler (supra) as it has become generally fixed in perjury cases in the

state and federal practice is merely a codification and redeclaration of what has come to us from the Bible itself in Deuteronomy, Chapter 17, Verse 6, wherein it is stated:

> "By the mouth of two or three witnesses shall he die that is to be slain. Let no man be put to death, when only one beareth witness against him."

And again in Deuteronomy, Chapter 19, Verse 15, it says:

> "One witness shall not rise up against any man, whatsoever the sin or wickedness be; but in the mouth of two or three witnesses every word shall stand."

The same principle was re-asserted in Matthew, Chapter 18, Verse 16, and in John, Chapter 8, Verse 17:

> "And in your law it is written that the testimony of two men is true."

Under this general consideration in the case of *McWhorter* v. *U. S.*, 193 F.2d 982, 985 (5th Circuit) (1952), it is pointed out that opposite oaths affirming and denying the same fact without more does not sustain conviction of perjury.

The United States Court of Appeals for the District of Columbia Circuit in its opinion, page 3, states:

> "The evidence we have outlined was not merely the oath of one person. It consisted mostly of documents which, if believed, made the conclusion inescapable, at least as certain as corroborated direct testimony upon this subject matter, i.e., citizenship, would have been."

The only witness that the Circuit Court could have been referring to was the witness Conley, a police officer who merely testified that he was present when certain information was taken from the appellant at the time of an

arrest more than thirty years earlier and supposedly heard the appellant advise the Desk Sergeant that he (the appellant) was born in Italy. This testimony was not of the type contemplated in the one witness rule but moreover was completely discredited by the witness himself as indicated in his answers on cross examination (R. 127A).

B. Admission of Police Records and Census Records as to Nativity, Which Were Necessarily Hearsay as to the Petitioner and not Coming Within any Exception to the Rule.

The Trial Court over objection on behalf of the Petitioner admitted in evidence Government Exhibits 12, 13, 16a and b, 17, 18, 19, 20 and 21 (R. 166A-187A) same being records in the one instance of arrests of an individual suggested as being the Petitioner (although no proof of identity was offered) and in the second instance census records for two different years. As to both groups of records it was suggested by the prosecution that the same were admissible to show prior statements indicating the place of birth of the Petitioner to be Italy. Insofar as the arrests were concerned (with one exception) there was no evidence offered that would identify the individual named on said records as being the individual on trial. Likewise the census records were manifestly compiled on the basis of information supplied by somebody other than the Petitioner and without his knowledge.

In several cases it is pointed out that under the Model Act or similar statutes, reports have been held to be inadmissible.

In *Johnson* v. *Lutz,* 253 N.Y. 124, 170 N.E. 517, it was held that a policeman's report of an accident which was filed by him in the station house, where he was at the time of the accident but made on the basis of hearsay

statements of persons alleged to have been present at the scene of the accident were not admissible under any exception to the hearsay rule. In *Amsden* v. *Washington Bridge Express Lines,* 287 N.Y.S. 855, a town police blotter was held not to be admissible under the Model Act in an action for injuries received in an automobile accident.

In the case of *Gencarella* v. *Fyfe,* 171 F.2d 419, the court indicated that a police report of accidents based in part on what others told the reporting officer as well as on his personal observation, was inadmissible in its entirety as an "entry made in regular course of business" either under the common exception to hearsay rule or under federal shop-book rule as contemplated in Section 1732, Title 28, U.S.C. and its predecessor statute.

In the case of *Palmer, et al* v. *Hoffman,* 318 U.S. 109, 120, 87 L.Ed. 645, it was pointed out that the written statement regarding a grade crossing accident made to a railroad company by the engineer of the train involved in the accident is not, although made pursuant to an established routine, a record made in the regular course of business within the provisions of Title 28, U.S.C. 1732 (formerly Section 695).

In *New England Newspaper Pub. Co.* v. *U. S.,* 18 F. Supp. 674, it was held that two statements by deceased longshoremen—one in the form of a written report made by deceased timekeeper to his superior and the other in the form of an affidavit—were not admissible in evidence under 28 U.S.C. 1732.

As to the admission of census records attention is first directed to Wigmore on Evidence (3rd Ed.) Vol. 5, Sect. 1671, Pages 685-6, wherein the author states:

> "The census is an inquisition of population, manufacturers, agriculture, wealth, and many other classes

of sociological data, is made under an express legislative warrant and authority; it is therefore admissible under the general principle already considered. But the authority given is to report *general classes of facts;* that details as to individual persons, factories, farms, and the like are noted only as a necessary basis for the general and anonymous summaries. Hence the census reports are not receivable to show the age of a particular person or the product of a particular factory or the area of a particular farm." (Emphasis supplied).

In *Campbell* v. *Everhart,* 139 N.C. 503, 52 S.C. 201, it was held that census reports are competent to prove facts of public nature, but that they are incompetent to prove the age of a particular person or that the particular person was not in esse at the particular time.

The pronouncement by Wigmore and *Campbell* v. *Everhart* (supra) is also set forth in Wharton's Criminal Evidence, 11th Edition, Page 1360, Footnote 14.

In the case of *Hegler* v. *Faulkner, et al,* 153 U.S. 107, it is pointed out that a list filed in the Indian Department, and which, or a copy of which, had been sent to the Special Agent to assign or allot the lands to Indians is not admissible in evidence in a legal controversy to prove the age of one of said Indians.

The United States Court of Appeals for the District of Columbia Circuit in its opinion, page 4, states that the census records were admissible simply because they were taken pursuant to the New York State Constitution. No effort is made to meet the cases that are cited above under this heading and which were also called to the attention of the Appellate Court.

In addition the Circuit Court, at page 5, as to the police records stated as follows:

> "The police records are a different and more difficult problem. * * * But we think the error, if there was one, does not require reversal of the judgment."

It is difficult to understand how the lower court can minimize a situation that not only is violative of the hearsay rule and does not come within any exception to said rule but that moreover is violative of the constitutional rights of the subject.

C. Because of Prosecutor's Comment to Jury as to Failure of the Petitioner to Offer Testimony in his own Behalf.

In the opening argument to the jury made by the prosecutor as appears in official transcript (Tr. 478-480) there occurred the following:

> "We heard it from our family sometime or another quite early. I have no doubt that your experience is that children as young as three, certainly four and five, know very close to how old they are—maybe exactly. Sometimes we find, and I have found it, that they know it to the day and keep reminding you of it. But they know it and they know it because they were told that by some relative, usually their parents.
>
> "And having been told that, that is the proper way to find out. The law recognizes that. The law isn't as blind and unreasoning as we sometimes like to think. They recognize that is the only way you are going to find out where and when you were born. And they recognize that that is evidence not only upon which you can base your belief but which is admissible in court.
>
> "I say that because were there any serious dispute about the fact in this case as to where Joseph was born, or where he thought he was born which is likewise important, we could have had testimony from witnesses in this case. The Government indeed produced Antonio, the brother, who, when he was asked where he was born and how old he was, said that he

was born in 1898 in Montemarano, Italy, and that the reason he knows it is he got it from his family. It is legal evidence in this courtroom.

"Likewise, he could have said, had he been called by Mr. Collins on behalf of Joseph Doto, concerning Joseph that it was said in Joseph's presence.

"MR. COLLINS: If Your Honor please, might we approach the bench?

"THE COURT: Yes.

(At the bench.)

"MR. COLLINS: I want to object to this argument of Mr. Hitz. The inescapable effect of what he has just said is that he is commenting on the failure of the defendant to offer testimony. He said I could have called him.

"THE COURT: He has a right to comment on your failure to call testimony if he wants to.

"MR. HITZ: Antonio.

"THE COURT: He is talking about Antonio; not about your client.

"MR. COLLINS: He is commenting on the fact that I didn't offer evidence. Under the rule—

"THE COURT: You don't have to.

"MR. COLLINS: And he is commenting on the fact I didn't. I say that is prejudicial and I therefore move for the withdrawal of a juror.

"THE COURT: I overrule the motion. I know of no reason why he can't comment upon your failure to call witnesses, if he wants to, providing he is not referring to the defendant, and I am sure Mr. Hitz wouldn't—

"MR. COLLINS: That is not my comprehension of the law, Your Honor. I simply wanted to make my point.

(In open court)

"MR. HITZ: Antonio could have been asked a question as to where he may have heard that his brother, Joseph, was born from his family, but he was not asked that question and he was not called by the defendant to give that testimony. I say it is because he could not have said what Mr. Doto told

> the Committee, namely, that he was born in this country and he was a citizen, or you can be sure that Mr. Collins, one of the ablest lawyers in this country, would have produced that evidence in this court."

At the outset of this discussion it must be borne in mind that the Fifth Amendment to the Constitutition of the United States provides as follows:

> "* * * nor shall be compelled in any criminal case to be a witness against himself, * * *".

Consistent with this provision of the Constitution and the fundamental law that has developed in connection therewith the Trial Court before the above argument made by the prosecutor, granted Instruction No. 19, offered by the defense (R. 17A) which reads as follows:

> "The jury is instructed that a defendant in a criminal case is not required to prove his innocence or to offer evidence in connection therewith; the fact that the defendant did not take the witness stand and testify in his own behalf, does not create any presumption against him; the jury is charged that it must not permit that fact to weigh in the slightest degree against any such defendant nor should this fact enter into the discussions or deliberations of the jury in any manner."

As one reads the remarks of the prosecutor above set forth and the colloquy that ensued it is respectfully urged to this Court that the above instruction was permitted by the Trial Court to be completely destroyed.

In *Kassin* v. *U. S.*, 87 F.2d 183, a conviction reversed for other reasons, the Court deemed the following argument of the United States Attorney improper and unsound in law and fact:

> "The Government of the United States is trying to convict this man, and on this undisputed evidence we are entitled to have twelve reasonable men believe he

> was a member of this gang and if it was the act of one it was the act of all. If he had any legitimate business down here, gentlemen, God knows we are entitled to have him explain to you twelve men here * * * not him—but by other witnesses."

Reference is made to the discussion under Point III, D of this Petition, wherein it is pointed out that counsel for the Petitioner was precluded from asking the witness the very question that was made the subject of the prosecutor's comment in argument.

In the case of *Berger* v. *U. S.*, 295 U.S. 78, 89, 79 L.Ed. 1314, this Court even in the face of counsel's failure to object or make necessary motion, reversed because the conduct of the prosecutor was prejudicial. In this case there can be no question as is demonstrated (Tr. 479-480) that counsel for this Petitioner objected and fortified said objection with a motion for mistrial.

In *Wilson* v. *U. S.*, 149 U. S. 60, 37 L.Ed. 650, this Court faced with a situation of this type pronounced as follows:

> "The refusal of the court to condemn the reference of the district attorney and to prohibit any subsequent reference to the failure of the defendant to appear as a witness tended to his prejudice before the jury, and this effect should be corrected by setting the verdict aside and awarding a new trial."

As in the Berger case (supra) the Court in *Vendetti* v. *U. S.*, 45 F.2d 543, points out that statements of government counsel may prove so prejudicial to rights of the defendant as to necessitate new trial notwithstanding absence of objection. Again Petitioner urges as is demonstrated of record (supra) that in the instant case objection was timely made and otherwise carried into effect by Motion for Mistrial.

See also Title 18, Section 3481, U. S. C.

D. Where Prosecutor Elicited Pedigree Facts on Direct Examination of his Witness and Petitioner Through his Counsel by Way of Cross Examination was Denied the Right to Interrogate in the Field Opened up by the Prosecutor.

As otherwise indicated in this Petition the prosecution called as one of its witnesses Anthony Doto, a brother of the Petitioner. The prosecutor (R. 93A-118A) examined the witness at great length with reference to his own personal life and pedigree aspects in connection therewith but as well many details with reference to the family which must be viewed in the light of pedigree evidence.

Counsel for Petitioner, in the face of this broad and comprehensive direct examination of the witness in which he gave pedigree facts as to other members of the family and himself, asked the witness (R. 119A):

> "Did your family discuss with you—Did you ever hear a discussion by your family with reference to Joseph and where he was born?"

The prosecutor interposed an objection and at the Bench urged that the question was beyond the scope of direct examination. After considerable colloquy at the Bench the Trial Judge asked counsel for the Petitioner if he wanted to make the witness his witness at that time and counsel for the Petitioner replied:

> "I don't want to do that, Your Honor. I stand on the position that I have taken. I think it is within the scope of the direct examination. The pedigree of this family has been completely opened up by Mr. Hitz on direct examination."

The prosecution manifestly placed Anthony Doto on the stand for the purpose of proving pedigree facts about the Petitioner and other members of the family. His questioning as to his knowledge about his coming from Italy to this country supposedly with his mother, the Petitioner and other members of the family, was all with a

view of eliciting family pedigree and moreover, as he was contending, family pedigree that suggested that the Petitioner was born in Italy. Notwithstanding this broad scope of examination the Court ruled that the question by counsel for Petitioner was beyond the scope of direct examination.

The opinion of the United States Court of Appeals for the District of Columbia Circuit on page 4 states:

> "The prosecutor asked no 'pedigree' questions of the witness Anthony Doto and so did not open that line of inquiry to cross examination."

The Petitioner finds it difficult to understand this broad statement by the court in the face of the record. Beginning at 94A (R.) and at the threshold of testimony given by Anthony Doto, brother of the Petitioner, we find the following questions:

> "Q When were you born, Mr. Doto? A November 12, 1898.
> "Q Where were you born, sir? A Italy.
> "Q Where? A Italy.
> "Q Where in Italy? A Montemarano."
>
> • • • •
>
> "Q Were your mother and father born in Italy? A Yes, sir."
>
> • • • •
>
> 95A "Q Where were they born over there, sir? A Montemarano.
> "Q The same town as where you were born? A Yes, sir.
> "Q Are you older or younger than Joseph on trial? A Older.
> "Q How much older? A Approximately two years.
> "Q Approximately— A Four years, I am sorry.
> "Q Your years. Do you have brothers other than Joseph? A Yes, sir.
> "Q Will you name the one next to you in age?

You are the oldest of the children of Maria De Vito and Michele Doto; are you not, sir? A Yes, sir.

"Q Will you name the next oldest child to you? A Albert.

"Q Albert? A That is right."

• • • •

"Q Now, how much older are you than Albert? A Approximately two years.

"Q And then would Albert be approximately two years older than Joseph? A That is right."

• • • •

"Q How much older than James was or is Joseph? A I wouldn't know that, sir.

"Q Well, how much older than you is he, Mr. Doto? A I don't know his right age. I couldn't say."

• • • •

96A "Q Is James about seven years or so younger than you? A Could be."

• • • •

"Q Is that right, sir? A Approximately.

"Q And is James two or three years younger than Joseph? A Could be, but I don't know exactly."

• • • •

"Q Was your grandfather on your mother's side named Pietro Concetta? A Maybe."

• • • •

"Q Your mother's mother's family name was Mongiello? A My mother's mother?"

It would serve no purpose for Petitioner in this Petition to cite the unlimited number of cases on the proper indulgence of cross examination in the face of the broad scope of direct examination.

The position of the prosecutor in this instance but further emphasizes the error contained in the point previously urged as to his cross examination of this same witness and the prejudice that such entailed.

CONCLUSION

For the foregoing reasons, Petitioner requests that Petition for Writ of Certiorari be granted.

Respectfully submitted,

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